



INTERIOR BOARD OF INDIAN APPEALS

Neighbors for Rational Development, Inc. v. Albuquerque Area Director,
Bureau of Indian Affairs

33 IBIA 36 (10/05/1998)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

NEIGHBORS FOR RATIONAL DEVELOPMENT, INC.

v.

ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 97-153-A

Decided October 5, 1998

Appeal from the approval of a lease from the 19 Pueblos of New Mexico to the Indian Pueblos Federal Development Corporation.

Affirmed.

1. Indians: Lands: Environmental Assessments--National
Environmental Policy Act of 1969: Environmental Assessments

The Board of Indian Appeals will apply a rule of reason developed in the Federal courts to determine whether an environmental assessment contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences of a proposed action.

2. Indians: Lands: Environmental Assessments--National
Environmental Policy Act of 1969: Environmental Assessments

An environmental assessment need not contain a fully developed plan detailing what steps will be taken to mitigate environmental impacts.

APPEARANCES: Maria O'Brien, Esq., and John W. Utton, Esq., Albuquerque, New Mexico, for Appellant; Tim Vollmann, Esq., and Dori E. Richards, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Albuquerque, New Mexico, for the Area Director; B. Reid Haltom, Esq., and Shawn R. Frank, Esq., Albuquerque, New Mexico, for the Indian Pueblos Federal Development Corporation.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Neighbors for Rational Development, Inc. (NRD), seeks review of a June 18, 1997, approval by the Albuquerque Area Director, Bureau of Indian Affairs, of a lease from the

19 Pueblos of New Mexico (Pueblos) 1/ to the Indian Pueblos Federal Development Corporation (IPFDC), covering the 46-acre former Albuquerque Indian School (AIS) property. 2/ For the reasons discussed below, the Board affirms the Area Director's decision to approve the lease.

Background

The AIS property was conveyed to the Pueblos in 1984, under authority of 25 U.S.C. § 293a. In January 1993, the Pueblos reconveyed the property to the United States in trust for themselves. The Secretary of the Interior issued a trust deed for the property on January 15, 1993.

Also on January 15, 1993, the Secretary issued a charter to the IPFDC under 25 U.S.C. § 477. The charter authorized the IPFDC to represent the Pueblos in connection with the development of the AIS property and in connection with any further property the Pueblos might acquire as tenants-in-common. It stated that the IPFDC was to "operate as agent and conduit for the Indian Pueblos, holding a leasehold interest in property owned in common by the Indian Pueblos." Art. III, sec. 1.

In January 1994, 3/ the Pueblos and the IPFDC signed the lease at issue here, i.e., a "Perpetual Ground Lease Between the 19 Indian Pueblos of New Mexico and the Indian Pueblos Federal Development Corporation" covering the AIS property. 4/ Under the lease, the IPFDC was to "develop[] the Property with all due diligence in such manner and by such means as [the IPFDC] shall determine." Lease Provision 2.1.

After its incorporation, the IPFDC began planning the development of the AIS property. The All Indian Pueblo Council (AIPC), on behalf of the Pueblos, began the process of compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4335, in anti-

1/ These are the Pueblos of Acoma, Cochiti, Isleta, Jemez, Laguna, Nambe, Picuris, Pojoaque, San Felipe, San Ildefonso, San Juan, Sandia, Santa Ana, Santa Clara, Santo Domingo, Taos, Tesuque, Zia, and Zuni.

2/ NRD states that its members are "private landowners, business owners, and residents who reside, conduct business or own property in the vicinity of the AIS property." NRD's Opening Brief at 6.

3/ This is the date stated in the joint answer brief filed by the Area Director and the IPFDC. No dates of execution are shown on the record copy of the lease.

4/ In an opinion dated Dec. 15, 1993, the Regional Solicitor, Southwest Region, concluded that perpetual leases are authorized under sec. 17 of the Pueblo Lands Act, 43 Stat. 641-42, so long as the leases are approved by the Secretary or his delegate.

pation of a request for Secretarial approval of the lease. In May 1994, the AIPC met with local residents concerning an as-yet unreleased draft environmental assessment (EA). The draft EA was released in June 1994. It stated that development plans were still at a nascent stage and that the AIPC had approved only a plan for administrative offices and ancillary uses. June 1994 Draft EA at 4.

On October 8, 1994, notice of a final EA was published. BIA received a number of comments from local residents, neighborhood associations, and governmental entities. In addition, Representative Steven Schiff expressed an interest in the matter. On April 25, 1995, Representative Schiff conducted a public meeting at the Area Office. A newspaper report of the meeting indicated that a major concern of local residents was that a casino might be constructed on the property. Other reported concerns were noise, traffic, and air quality.

In March 1996, another draft EA was released. This draft indicated that the Pueblos had adopted a Master Plan Concept for the property, which "include[d] 410,000 square feet of space for administrative offices, minor ancillary uses, a 300-room hotel and conference center, 70,000 square feet of retail/specialty restaurants and associated parking for 2,000 vehicles." March 1996 Draft EA at 1.

Two public hearings on the new draft EA were conducted in April 1996, chaired by the Regional Environmental Officer for the Department of the Interior. A number of local residents spoke at these hearings. Local residents also submitted written comments.

The final EA was released in August 1996. On October 15, 1996, the Area Director signed a Finding of No Significant Impact (FONSI), stating:

The Bureau of Indian Affairs has determined that the approval of the lease and associated development of the property along with mitigation measures outlined in the EA, will not have a significant impact on the quality of the human environment.

The determination is supported by findings as follows:

1. Public involvement was conducted and environmental issues related to the development of the AIS property were identified. Alternative courses of action and mitigation measures were developed in response to environmental concerns and issues.

2. The EA discloses the environmental consequences of the proposed action and five potentially viable alternatives which include different sites, reduced project size, larger development size, other site use alternatives, and the "no action" or lease disapproval alternative.

3. Since the proposed site is virtually void of vegetation, relatively flat and not within a 100 year floodplain, impacts to land resources will not be significant (Section 4.1).

4. There will be no impacts to surface waters or wetlands. There is ample supply of City water and sewage for the proposed project. In addition, two on-site wells may be used at a capacity that will not exceed their established water rights and will have a minimal effect on the groundwater. (Sections 3.2.1 and 4.2).

5. There are no threatened or endangered species nor are there any archeological sites on the proposed location of the AIS development. (Sections 4.3 and 4.4).

6. The analysis in EA Section 4.5 shows that the proposed project will not result in a violation of the federal carbon monoxide (CO) standards nor will the proposed project cause or contribute to any new violation of any air quality standard.

7. The proposed project will have beneficial effects for both Pueblo members and residents living near the site on both a short-term and long-term basis (Section 4.6). Significant increase to property values is not expected.

8. Since all former structures on the site have been removed, no existing developed land use will be displaced. To the maximum extent possible, there will be no conflicts with the existing City and local plans and uses (Section 4.7).

9. Several mitigation measures have been outlined in EA Section 4.8 to minimize traffic impacts when the project is completed and in full operation. Congestion and delays will be largely reduced by improvements to 12th Street and Menaul Boulevard. Additional studies will be conducted after a final Master Plan has been developed to ensure mitigation is still adequate.

10. Wastes generated from the project will be municipal non-hazardous wastes from both construction and operation of the proposed project and sewage wastes. These wastes will be disposed using routine City techniques (Section 4.9).

11. Using noise prediction models, the proposed AIS development would result in negligible changes in noise levels at receivers located in the project vicinity. Table 5 in Section 4.9 shows less than 1 dBA increase at each receiver location. 3 dBA is required for the human ear to notice a change.

12. No known scenic views will be blocked and design will conform to local standards to the maximum extent possible. Impacts from light pollution are considered minimal with proper angling of lights, placement of trees, and landscaping using appropriate color and material choices.

13. Impacts to public safety are mitigated through measures outlined in Section 4.12 for fire and police protection. IPFDC will formalize agreements with the City to provide for law enforcement, fire protection and emergency services.

Notice of availability of the FONSI was published on October 14, 1996. ^{5/} The comment period expired on November 20, 1996. A number of local residents submitted comments and/or sought an extension of the comment period. The Area Director declined to extend the comment period but agreed to postpone approving the lease pending attempts by Representative Schiff to arrange another meeting between the Pueblos and local residents.

On January 16, 1997, Representative Schiff wrote to the Chairman of the AIPC. He mentioned the possibility of a meeting and continued:

I believe there are two areas of concern which, if addressed, will alleviate a great deal of my concern surrounding this issue. * * * I believe that an agreement to the following could obviate the need for a formal meeting.

Because the Old Indian School property is located within Albuquerque city limits, I respectfully request that the [AIPC] and the [IPFDC] add the following provisions to the lease with the [BIA]:

1. A provision in the lease which states that if a gaming compact is agreed to by the New Mexico State Legislature and the Pueblos, which would legally allow gaming at the Old [AIS] property, an Environmental Impact Statement [(EIS)] be completed to address the effects of a gaming establishment on the property, before gaming commences there.

2. A provision in the lease that would require the management of the Old [AIS] property to adhere to all applicable municipal ordinances, as negotiated between the City of Albuquerque and the [IPFDC].

^{5/} It is not clear from the record how notice of the FONSI came to be published before the Area Director signed it. However, NRD does not challenge the validity of either the FONSI or the notice on the basis of the pre-signature publication.

On February 26, 1997, NRD's attorney wrote to the IPFDC, the Regional Solicitor, and the Chief Administrative Officer for the Mayor of Albuquerque. She stated that NRD sought, inter alia, amendments to the lease along the lines proposed by Representative Schiff.

All three officials responded to the attorney's letter. The Chairman of the IPFDC responded on March 31, 1997, stating that the IPFDC would agree to stipulations to address NRD's concerns but would not agree to amend the lease. He stated that the IPFDC "agrees to comply with City ordinances, plans and procedures, and/or in some cases, enter into Joint Power Agreements [(JPAs)] between the City and the [IPFDC], which would then become a formal and enforceable document." On the casino question, the Chairman stated: "The 19 Pueblo tribes do not plan to develop a casino on the AIS property and would agree that if any plans arose in the future to build a casino, it would require a complete and independent [EIS]."

The Regional Solicitor responded on April 8, 1997, stating that BIA had also agreed that an EIS would be prepared prior to approval of any gaming on the AIS property. He noted the willingness of the City and the IPFDC to address NRD's concerns through negotiation of agreements and further noted that NRD would have an opportunity to participate in that process.

The Mayor's Chief Administrative Officer responded on April 10, 1997, stressing the need for cooperation among the parties. Observing that the IPFDC had verbally agreed to follow City ordinances, he stated that the City would appoint a "technical team" to review specific site plans for the property to ensure compliance. He invited NRD to appoint a representative to the team.

On May 21, 1997, representatives of the IPFDC and NRD agreed in principle to enter into a written agreement concerning development of the AIS property.

On June 18, 1997, the Area Director approved the lease.

On June 20, 1997, NRD and the IPFDC entered into an Interim Agreement for mitigation of the impacts of development of the AIS property. The parties agreed that "mitigation of impacts of the development on the surrounding residential neighborhoods would best be addressed in the context of agreements to be negotiated between the City of Albuquerque * * * and IPFDC." Interim Agreement at 1. The IPFDC agreed to support inclusion of NRD in the negotiations with the City. NRD agreed "to fully support development of the AIS property and participate in good faith in negotiations between the City and IPFDC provided all parties work in good faith to address mitigation of the AIS development on the surrounding residential neighborhoods." *Id.* at 2, para. 3. The parties agreed that an agreement between IPFDC and the City would appropriately address mitigation measures with respect to traffic, lighting, signage, air quality, noise, building location and density, land use, and drainage. Paragraph 6 of the Interim Agreement stated:

Nothing in this Agreement shall waive any rights NRD may have pursuant to the NEPA or other pertinent laws; however, NRD agrees that if IPFDC complies with

the terms of this Agreement, and all obligations thereunder, NRD will support the approval of the IPFDC lease by [BIA], and support development of the property.

NRD appealed the Area Director's June 18, 1997, lease approval to the Board, alleging that BIA had failed to comply with NEPA. In its initial filing, NRD mentioned the June 20, 1997, Interim Agreement and stated:

Full compliance with the Interim Agreement by all parties, and the signing by the City and IPFDC of an agreement that fully incorporates the mitigation of development impacts addressed in the Interim Agreement, would make this appeal moot, as the primary basis for this appeal is the BIA's failure to comply with NEPA's requirements that mitigation of impacts be considered and addressed.

NRD's Notice of Appeal and Statement of Reasons at 3.

Following the completion of briefing, the parties jointly requested a stay of proceedings, stating that they had recently met with the City to negotiate a JPA between the City and the IPFDC. As a result of those discussions, they stated, they believed a resolution of this matter was imminent.

The Board stayed proceedings. On August 24, 1998, the Board received a status report from the Area Director and the IPFDC, stating that the City and the IPFDC were in agreement as to the terms of a JPA but that NRD, although initially appearing to agree to the terms of the JPA, had written to the Mayor of Albuquerque on August 14, 1998, apparently changing its position. They enclosed a copy of NRD's letter to the Mayor, which clearly appeared to support their assertions. ^{6/} Stating that settlement of this dispute now appeared unlikely, the Area Director and the IPFDC requested that the Board proceed to issue a decision in this appeal.

^{6/} The letter states that NRD now believes the negotiations to be "off-track" and also believes drafts of the agreement to be deficient, particularly with respect to enforceability.

The draft agreement furnished to the Board with the status report is termed a "Development and Services Agreement" and provides in part:

"3. Zoning Classification and Site Development Plan. IPFDC has agreed to a Special Use Zoning District. IPFDC shall submit a Site Development Plan as part of the Special Use Zoning Classification to the City and shall submit to the EPC [evidently a City agency] process as outlined by the Zoning Code. The Site Development Plan and any significant amendments thereto shall incorporate all necessary mitigation measures, including, but not limited to, those set forth in the Interim Agreement between NRD and IPFDC addressing: traffic, lighting, signage, air quality, noise, building location and density, land use and drainage. Other than agreed herein, the Parties understand that IPFDC is not bound by the recommendations or determinations of the EPC, but shall negotiate such recommendations or determinations to be eligible to receive City Services. Upon City approval of the Site Development Plan, IPFDC shall be eligible for govern-

Because the parties were no longer in agreement that this proceeding should be stayed, the Board lifted its stay on August 25, 1998. On September 14, 1998, the Board received a letter from NRD, stating that it did not concur in the facts as stated in the status report filed by the Area Director and the IPFDC. NRD did not provide an alternative statement of the facts.

Given the long history of this dispute and the apparently slim possibility that the parties will be able to reach agreement, the Board grants the request of the Area Director and the IPFDC for expedited consideration.

NRD's Objections to the Record

NRD submitted a number of objections to the record. The additional documents attached to NRD's objections are accepted and made a part of the record. NRD's remaining objections are denied.

Discussion and Conclusions

NRD's filings in this appeal include a veritable laundry list of alleged violations of NEPA and its implementing regulations. The Board addresses what appear to be NRD's principal arguments. Arguments made by NRD but not specifically addressed in this decision have been considered and rejected.

NRD alleges that the EA is fatally flawed because it failed to analyze the Federal action itself, *i.e.*, BIA's approval of the lease, but instead analyzed the development proposed by the IPFDC and described in the Master Plan Concept. While NRD does not fully develop this argument, it appears to be contending that BIA was required to analyze every possible use that might be made of the AIS property under the lease, in addition to the uses which the IPFDC actually proposed.

BIA had a duty to analyze the reasonably foreseeable environmental impacts of the proposed development, as well as reasonable alternatives to the proposed development and their reasonably foreseeable impacts. Scientists' Inst. for Public Info. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (D.C. Cir. 1973). However, BIA was not required to make a "crystal ball" inquiry concerning every possible use that might arise sometime in the future. Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 837 (D.C. Cir. 1972). Indeed, as the Supreme Court has stated, "[c]ommon sense * * * teaches us that 'the detailed statement of alternatives' [in an EIS] cannot be found wanting simply because the agency failed to include every alternative

fn. 6 (continued)

ment services, as described in Paragraph 1 above. After City review and acceptance of IPFDC's Site Development Plan ("Plan"), any amendments to the Plan or any proposed uses not in conformance with the Plan or Zoning Classification shall be submitted for review as outlined by the City zoning code."

device and thought conceivable by the mind of man." Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 551 (1978). 7/

While appearing to acknowledge these principles, NRD contends that "it does not take a crystal ball to realize that a reasonable alternative to the alleged 'Master Plan' is one that includes gambling." NRD's Reply Brief at 14.

The AIPC and the IPFDC stated throughout the NEPA proceedings that they had no plans to authorize gaming on the AIS property. The EA discussed a rejected casino alternative:

Although the IPFDC previously had considered a casino as a possible use of the AIS property, there are no plans for a gaming establishment at this time. Even if the site were to be used for a gaming establishment in the future, moreover, the Board of Directors of IPFDC has determined, by Resolution No. 95-02, that such gaming will only under [sic] a gaming management agreement. Under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721, any gaming management contract must be approved by the Chairman of the National Indian Gaming Commission. The Commission has interpreted the approval of any such contracts involving the development or construction of a gaming operation as a federal action which triggers compliance with NEPA. The Commission has indicated that NEPA compliance in such cases will include public involvement and the preparation of an [EA] or where appropriate, an [EIS].

An environmental analysis of the alternative of a gaming establishment is, therefore, not required at this time, both because the IPFDC is not currently considering gaming as an option for the AIS site and because, even if such an

7/ A rule of reason has evolved in the Federal courts regarding an agency's choice of alternatives to be discussed in a NEPA document. The rule was recently discussed in Corridor H Alternatives, Inc. v. Slater, 982 F. Supp. 24, 29 (D.D.C. 1997):

"NEPA does not describe how many alternatives)) or which alternatives)) an agency must discuss in the [final EIS], and CEQ [Council on Environmental Quality] regulations state only that an agency must discuss those alternatives that are reasonable and feasible. 40 C.F.R. § 1502.14. Courts have interpreted this to impart a "rule of reason" that governs both the agency's choice of alternatives to discuss and the extent to which it discusses them. City of Grapevine[, Texas v. Department of Transportation], 17 F.3d [1502,] 1505 [(D.C. Cir. 1994), Citizens Against Burlington[, Inc. v. Busey, 938 F.2d [190,] 195-96 [(D.C. Cir. 1991)]. Under this rule of reason, as long as the agency makes these choices reasonably in light of the goals, needs, and purposes that it has set for the project, its discussion of alternatives is upheld. Burlington, 938 F.2d at 196."

See also Johnson v. Acting Minneapolis Area Director, 32 IBIA 147 (1998).

option is pursued at a later date, a complete environmental analysis of the alternative will be required when a proposed management contract is submitted to the National Indian Gaming Commission. The public and all interested parties will have an opportunity to comment on the environmental effects of such a development at that time.

Final EA at 6-7.

As noted above, after issuance of the final EA and the FONSI, both the IPFDC and BIA committed to the preparation of a full-blown EIS prior to any approval of gaming on the AIS property. Thus, while NRD appears to be contending that the establishment of a gaming facility on the AIS property will escape NEPA review unless it is required to be included in this EA, that is clearly not the case.

Even disregarding the post-EA commitments made by the IPFDC and BIA, and judging the EA as of the time it was issued, the Board finds that, given the facts described in the EA, there was no requirement that the EA analyze gaming as an alternative use of the AIS property.

Further, insofar as NRD contends that BIA was required to analyze an undescribed and apparently unlimited "multitude of possible projects that could occur on the AIS property" (NRD's Reply Brief at 14), the Board finds that the contention must be rejected under the principles discussed above.

In a related argument, NRD contends that BIA erred in analyzing alternative uses of the AIS property rather than an alternative lease, *i.e.*, a lease different than the one signed by the Pueblos and the IPFDC, such as "a lease with built-in mitigations or restrictions on development." NRD's Opening Brief at 15. In connection with this argument, NRD contends that the United States Court of Appeals for the Ninth Circuit in Cady v. Morton, 527 F.2d 786, 797 (9th Cir. 1975), "made clear that one of the alternatives which should have been included in the context of the environmental compliance process was the rejection of the lease between the tribe and the third party." Id.

To the extent NRD may be contending that BIA failed to consider lease disapproval as an alternative in this case, it is clearly wrong. Lease disapproval is discussed in the EA as Alternative No. 1, the "no action" alternative.

With regard to an "alternative lease," NRD appears to be suggesting that BIA could or should rewrite the lease between the Pueblos and the IPFDC. Aside from any implications such an assertion of authority by BIA would have for Federal Indian law and policy, it would also be relatively meaningless for NEPA purposes. What matters for NEPA purposes is not the lease document itself, or even the signature of the Area Director on that document, but the development which will occur as a result of the Area Director's approval of the document. For this reason, it was appropriate for BIA to analyze the development actually proposed, and reason-

able alternatives to that proposed development, rather than attempt to analyze the lease in a vacuum or posit an alternative lease and analyze it in a vacuum. Cf., e.g., Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Portland Area Director, 27 IBIA 48, 56 (1994) (It was not error for BIA to prepare an EA based on planned development for land acquired in trust, rather than on the trust acquisition per se).

NRD next argues that BIA was required to analyze cumulative impacts but failed to do so. Here again, NRD is contending that BIA was required to anticipate every possible future use of the AIS property. The EA analyzed the cumulative impacts of all proposed development. For the reasons discussed above, BIA was not required to analyze the supposed cumulative impacts of all remotely possible future development on the property.

Next, NRD argues that NEPA was violated because the EA was not prepared until after the Pueblos and the IPFDC executed the lease. As NRD elsewhere recognizes, however, the Federal action here was the approval of the lease by BIA, not the execution of the lease by the parties. The EA was prepared well before BIA decided to approve the lease and thus in time "to serve practically as an important contribution to [BIA's] decisionmaking process." 40 C.F.R. § 1502.5.

In a somewhat confusing and seemingly contradictory argument, NRD contends that the EA violates 40 C.F.R. § 1506.5(c) because it fails to identify the preparer ^{8/} and that "BIA erred in retaining AIPC as a preparer, as it presents a clear conflict of interest." NRD's Opening Brief at 18.

As the Area Director and the IPFDC point out, 40 C.F.R. § 1506.5(c) applies to the preparation of an EIS, not an EA. As they also point out, subsection 1505.6(b) allows for the preparation of an EA by an applicant. The regulation requires that an agency make an independent review of the issues if an EA is prepared by an applicant. NRD does not fault BIA in this regard.

NRD next contends that BIA failed to give adequate and timely notice of public meetings. In a related argument, NRD contends that BIA failed to make numerous documents available for review by the public.

BIA published notice of the April 12, 1996, hearing in a local newspaper; mailed copies of both the hearing notice and the draft EA to individuals whose names were provided to BIA by a neighborhood spokesperson (later an active member of NRD); and made additional copies of the draft EA available at the hearing. The second public hearing, held on April 29, 1996, was announced at the first hearing and was arranged in coordination with the neighborhood spokes-

^{8/} In fact, the EA identifies the AIPC as the preparer.

person. It is apparent from the number of speakers at the second hearing that it was well publicized. 9/

An affidavit submitted by NRD in this appeal shows that BIA made a large number of additional documents available for inspection by the neighborhood spokesperson. There is no reason to believe that BIA would not have made these documents available to others as well, had others so requested.

Nothing in NRD's assertions concerning notice and availability of documents demonstrates that BIA violated NEPA or any of its implementing regulations.

NRD contends that the EA "fails to adequately evaluate the environmental impacts of the proposed lease and fails to address the multitude of comments provided by the public." NRD's Opening Brief at 23. With respect to the first of these two contentions, NRD argues that the EA is inadequate in its discussion of land resources; water resources; air quality impacts; traffic impacts; and noise, light, and visual impacts. NRD clearly disagrees with the analysis in the EA. Its arguments, however, consist of its own opinions, unsupported by any scientific data. Even had NRD produced expert opinions to counter the analysis in the EA, it would not be entitled to have those opinions substituted for those of BIA. See, e.g., Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.") Clearly, NRD's lay opinions are entitled to no greater deference.

BIA's task here was to take a "hard look" at the environmental consequences of its proposed action. E.g., Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). It is well established that NEPA is a procedural statute and "does not mandate particular results," id., and that an "agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." Id.

[1] In reviewing an EA or an EIS, Federal courts have declined to "'fly-speck' the document [or] 'hold it insufficient on the basis of inconsequential, technical insufficiencies'" but instead have applied a "rule of reason" to determine whether it contains 'a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" Swanson v. United States Forest Service, 87 F.3d 339, 343 (9th Cir. 1996).

9/ BIA also mailed copies of the final EA to the individuals who had submitted written or verbal comments, Federal and state legislators, and persons on a list provided by the neighborhood spokesperson.

After carefully reviewing the EA's analysis of each of the areas in which NRD alleges flaws, the Board concludes that the EA contains a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" flowing from the Area Director's lease approval in this case.

In the second part of this two-part argument, NRD contends that the EA should have addressed "the multitude of comments provided by the public." NRD devotes 13 pages of its opening brief to a list of public comments which it apparently believes ought to have been discussed in detail in the EA.

For the proposition that NEPA requires an EA to contain such a discussion, NRD cites 40 C.F.R. §§ 1500.1(b) and 1503.4(b). 40 C.F.R. § 1500.1(b), a part of the "Purpose" section of the CEQ regulations, contains no requirement that public comments be specifically addressed in an EA. ^{10/} Subsection 1503.4(b) requires assessment of comments but applies only to EISs, not EAs.

The final EA in this case, while it does not discuss specific comments, shows that comments were considered. See, e.g., Final EA at 7:

As a result of comments received on the draft EA, a housing development was also considered at the AIS site. This site, however, would be in a commercial area and would more than likely be of the low-income type. This would not meet the economic goals of the IPFDC. Also, while existing noise from I-40 would not have a major impact on the planned development project, it could have a significant impact on a housing development.

The Area Director and the IPFDC point out that, contrary to NRD's assertion that comments from the City were not considered or addressed, the record shows that at least two of the City's stated concerns were addressed in the 1996 draft and final EAs, through the inclusion of a more specific development plan and a more recent traffic study.

The FONSI also reflects the fact that public comments were taken into consideration.

^{10/} 40 C.F.R. § 1500.1(b) provides:

"NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail."

Finally, the administrative record for this appeal contains extensive public comments, including transcripts of the public hearings and letters from the public. By including these documents in the record, the Area Director represented that he considered them in reaching his decision. The Board has no reason to doubt his representation and declines to do so.

NRD has provided no support for its contention that NEPA requires all public comments to be specifically addressed in an EA. Nor has it shown that BIA failed to consider the comments submitted in this case.

NRD argues that the EA is inadequate with respect to mitigation measures. Acknowledging that the EA discusses mitigation, NRD contends that the measures discussed are vague and unenforceable, principally because the planned agreement between the IPFDC and the City has not yet been signed. 11/

[2] The Supreme Court has made it clear that, while mitigation measures must be considered, "NEPA does not require a fully developed plan detailing what steps will be taken to mitigate adverse environmental impacts," Robertson, supra, 490 U.S. at 359. The Court stated in Robertson that "it would be inconsistent with NEPA's reliance on procedural mechanisms)) as opposed to substantive, result-based standards)) to demand the presence of a fully developed plan that will mitigate environmental harm before an agency can act." Id. at 353. The Court also observed that, in the case before it (as in this case), the necessary involvement of state and local governments in mitigation made it "incongruous to conclude that the Forest Service has no power to act until the local agencies have reached a final conclusion on what mitigating measures they consider necessary." Id. at 352-53. 12/

The Board finds that, under the principles enunciated in Robertson, the EA's discussion of mitigation is entirely adequate for NEPA purposes.

11/ NRD stated at the outset of this appeal that "the primary basis for this appeal is the BIA's failure to comply with NEPA's requirements that mitigation of impacts be considered and addressed." NRD's Notice of Appeal and Statement of Reasons at 3. Yet, the subject of mitigation is only fleetingly addressed in NRD's 60-page opening brief and not at all in its reply brief.

12/ In Robertson, Federal, state and local agencies had entered into an MOU concerning mitigation. The lower court found that the MOU did not satisfy NEPA because it was vague and did not offer adequate assurance that mitigation would be achieved or even that effective measures would ever be designed. The Supreme Court specifically disapproved that finding, stating that, "[b]ecause NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures." 490 U.S. at 353 n.16.

The Board concludes that NRD has failed to show error in the Area Director's approval of the lease between the 19 Pueblos and the IPFDC.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Area Director's June 18, 1997, decision is affirmed.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge